A

PERBADANAN NASIONAL BHD

v.

YIP YEE FOO & ANOR

B

HIGH COURT MALAYA, KUALA LUMPUR
HASNAH MOHAMMED HASHIM JC
[SUIT NO: D-22-1511-2008]
15 JULY 2010

C

CIVIL PROCEDURE: *Striking out - Application for - Application to strike out plaintiff's writ of summons and statement of claim - Rules of the High Court 1980, O. 25 r. 1(4) - Whether applicable - Whether defendant satisfied ingredients pursuant to O. 34 of the Rules of the High Court 1980 - Whether application to have matter struck out misconceived and untenable*

D

The application (encl. 12) was an application pursuant to O. 25 r. 1(4) of the Rules of the High Court 1980 by the defendants against the plaintiff for an order that the plaintiff's writ of summons dated 12 August 2008 and the statement of claim dated 8 August 2008 be struck out with costs as the plaintiff failed to take out the summons for directions in Form 46 within one month after the pleading in this action was deemed to be closed. Briefly, the plaintiff had initiated an action against the defendants for breaches of an agreement. The first defendant submitted that it had filed and served the defence and accordingly the plaintiff should have filed a reply before the expiration of 14 days after the service of the defence. The defendant submitted that (i) the plaintiff had filed the application well beyond the one month period after the close of the pleadings; (ii) the plaintiff failed to cause to be issued from the Registry of the court notice in Form 63 pursuant to O. 34 r. 2(1) and (iii) the plaintiff's default was intentional, contumelious, inordinate and/or inexcusable and the first defendant had suffered prejudice. The plaintiff's argument, however, was that it had referred to the Practice Direction 1/2001 and submitted that O. 25 was not applicable and the Practice Direction must be complied with. The plaintiff submitted that the first defendant had not satisfied the mandatory ingredients pursuant to O. 34 RHC in making such application to have the matter struck out and that the first defendant's application was misconceived and untenable.

E

F

G

H

I

Held (dismissing encl. 12 with costs):

(1) The Practice Direction 1/2001 dated 19 June 2001 issued by the Registrar of the High Court Malaya did not deviate or supersede the court rules. The purpose of that Practice Direction was to effectively implement the pre-trial case management procedure under O. 34 RHC and to expedite the fixing and the hearing of cases in the High Courts. Therefore, unless that Practice Direction was revoked or withdrawn by the Registrar of the High Court of Malaya it still remained effective. This meant that O. 25 RHC was still suspended and therefore could not be applied by the first defendant to strike out this action. (para 10)

(2) The first defendant had not satisfied the ingredients pursuant to O. 34 RHC in making such application to have the matter struck out. The first defendant failed to apply to the court to issue Form 64 Notice to the plaintiff requiring the plaintiff to show cause as to why the action should not be struck out. Since the first defendant had not complied with the requirements under O. 34 RHC therefore the application to have the matter stuck off under this order would fail. (para 10)

(3) There was no evidence to show that there was intentional and contumelious delay. The writ and statement of claim was filed on 12 August 2008. It was served on the defendant and the defendant filed their appearance on 15 October 2008. The statement of defence was filed on 26 December and the application for summary judgment was filed on 18 August 2009. The period between the filing of the defence and the application for summary judgment was seven months. It was not an inordinate delay giving rise to a substantial risk that a fair hearing of the application would not be possible or to a serious prejudice to the first defendant. (para 10)

Case(s) referred to:

Dato' Leong Pow Kue & Ors v. Gan Kim Sing; Pentadbir Tanah Daerah Johor Bahru & Ors (Third Parties) [1999] 5 CLJ 426 HC ***(refd)***

Dato' Seri Anwar Ibrahim v. Tun Dr Mahathir Mohamad [2010] 1 CLJ 444 CA ***(refd)***

Idealmart Rukindo Sdn Bhd v. Capital OCA Berhad & Anor [2009] 1 LNS 75 HC ***(refd)***

Dryden v. Dryden [1973] Fam 217 ***(refd)***

Foo Poh Sang & Ors v. Lim Teik Cheong [2006] 4 CLJ 235 CA ***(refd)***

Ho Weng Kong v. Mann Foong Realty Sdn Bhd & Anor [2000] 6 CLJ 478 HC ***(refd)***

A *Idealmart Rukindo Sdn Bhd v. Capital OCA Berhad & Anor [2009] 1 LNS 75 HC* ***(refd)***
Leong Seng Kiat v. Law Peng Guan & Ors [1992] 2 CLJ 825; [1992] 2 CLJ (Rep) 710 HC ***(refd)***
Lim Heng Hoo v. Tan Hock Hai & Ors [1973] 1 LNS 79 FC ***(refd)***
B *Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd [2002] 1 CLJ 645 FC* ***(refd)***
Sia Sung Ho v. Usaha Cendera Cerah Sdn Bhd [2007] 9 CLJ 27 HC ***(refd)***
Toh Hock Thye & Ors v. Toh Chwee Biow [1981] 1 LNS 143 FC ***(refd)***
Vasudevan Vazhappulli Raman v. T Damodaran P V Raman & Anor [1981] CLJ 84; [1981] CLJ (Rep) 101 FC ***(refd)***

C **Legislation referred to:**
Courts of Judicature Act 1964, ss. 16, 17
Rules of the Court of Appeal 1994, rr. 18(4)(d), (7)
Rules of the High Court 1980, O. 18 rr. 3, 19(1)(b), (c), 20(1)(b), O. 25 rr. 1(1), (2)(a), (4), O. 27 r. 3, O. 34 r. 2(1), (2), O. 92 r. 3B
D
Divorce Reform Act 1969 [UK], s. 6

For the plaintiff - Alan Wong; M/s Zain, Megat & Murat
For the defendants - Tan Hock Chun; M/s Tan Hock Chun & Co

E *Reported by Suhainah Wahiduddin*

JUDGMENT

F **Hasnah Mohammed Hashim JC:**

[1] The application in encl. 12 is an application pursuant to O. 25 r. 1(4) of the Rules of the High Court 1980 by the defendants against the plaintiff for an order as follows:

G a) that the plaintiff's writ of summons dated 12 August 2008 and the statement of claim dated 8 August 2008 be struck out with costs as the plaintiff failed to take out the summons for directions in Form 46 within one month after the pleading in this action are deemed to be closed;

H b) cost.

[2] The application is supported by an affidavit affirmed on 12 October 2009.

I

Brief Facts

[3] The plaintiff entered into an agreement with one HK-Movie Entertainment Sdn. Bhd. ('the company') whereby the plaintiff agreed to provide financial assistance by subscribing the ordinary and preference shares the company offered. A subscription shares agreement was executed between the plaintiff, the company, Amernodin bin Osman (Director and Shareholder of the company and also was the proponent), Focal House Holding Sdn. Bhd. and the 2nd defendant as the existing shareholders of the company.

[4] Under the agreement the plaintiff agreed to subscribe 2,000,000 units of ordinary shares from the company at the price of RM1 each and 18,000,000 preference shares of RM1 each. The company was also to pay to the plaintiff a fixed non cumulative preferential dividend at the rate of 10% per annum, 10% net dividend of enlarged share capital during the tenure of the plaintiff's investment and to redeem the entire preference shares of the plaintiff in the event within two years from the plaintiff's subscription.

[5] The proponent irrevocably agreed to provide an undertaking of put option to purchase the entire plaintiff's call shares amounting to 1,500,000 at a buy back price of 9% per annum over the investment period.

[6] The terms of the guarantee agreement between the plaintiff and the defendants are as follows:

(a) to pay and satisfy the plaintiff on demand as principal debtor and not merely as surety for all every and any part of the monies payable to the plaintiff by the company and/or the proponent as stipulated under the agreement;

(b) the obligations of the guarantors shall not be discharged except by performance and then only to the extent of such performance;

[7] Despite demands from the plaintiff the defendants failed to rectify the breaches therefore the plaintiff initiated this action against the defendants.

[8] The Applicant/Defendant's Argument

8.1 The plaintiff did not take out a summons for directions in Form 46 pursuant to O. 25 r. 1(1) of RHC.

The 1st defendant's solicitors had filed and served the defence of the 1st defendant on the plaintiff solicitors. Accordingly pursuant to O. 18 r. 3 RHC the plaintiff should have filed a reply, if any, before the expiration of 14 days after the service of the defence. It is further submitted that pursuant O. 18 r. 20(1)(b) RHC if there is no reply the pleadings are deemed closed at the expiration of the 14 days after the service of the defence. The plaintiff did not file any reply after the service of the defence. Therefore the pleadings are deemed closed at the expiration of 14 days commencing from 26 December 2008 ie, on 9 January 2009.

The plaintiff must within one month after the pleadings are closed take out a summons for direction as set out in Form 46 RHC.

Order 25 r. 1(1) RHC reads as follows:

> (1) With a view of providing, in every action to which this rules applies, an occasion for the consideration by the Court of the preparations for the trial of the action, so that:
>
> (a) all matters which must or can be dealt with on interlocutory applications and have not already be dealt with may so far as possible be dealt with; and
>
> (b) such direction may be given as to the future course of the action as appear best adapted to secure the just expeditious and economical disposal thereof,
>
> The Plaintiff must within one month after pleadings in the action are deemed closed, take out a summons in Form 46 (in these rules referred to a summons for directions) returnable in not less than 14 days.

Due to the plaintiff's failure to take out a summons for directions in Form 46 the 1st defendant is entitled to file an application to strike out the writ of summons and statement of claim under O. 25 r. 1(4) RHC:

> (4) If the plaintiff does not take out a summons for directions in accordance with the foregoing provisions of this rule, the Defendant or any Defendant may do so apply for an order to dismiss the action.

8.2 The exception under O. 25 r. 1(2)(a) RHC is not applicable as the application for summary judgment (encl. 9) was not filed within one month after the pleadings are deemed to be closed. A

The plaintiff's solicitors have served on the first defendant's solicitors the sealed summons in chambers dated 18 August 2009 together with the affidavit in support. It is submitted by the learned counsel for the 1st defendant that O. 25 r. 1(2)(a) RHC will only apply if the plaintiff had filed within one month after the pleadings are deemed closed. B C

Order 25 r. 1 RHC and r. 1(2)(a) RHC must be read conjunctively. The exception under O. 25 r. 1(2)(a) would only be applicable if the plaintiff had filed the application for summary judgment one month after the close of the pleadings. The counsel for the 1st defendant cited the case of *Ho Weng Kong v. Mann Foong Realty Sdn Bhd & Anor* [2000] 6 CLJ 478 where the plaintiff was guilty of delay of over a year in seeking for summons for direction. D

The counsel submitted that the plaintiff should not be allowed to wait until it is ready to file an application for summary judgment without complying with the mandatory requirement under O. 25 r. 1(1) RHC. E

Further it is submitted that the plaintiff had filed the application well beyond the one month period after the close of pleadings. Counsel referred to the case of *Dryden v. Dryden* [1973] Fam 217 where the husband presented a petition for the dissolution of marriage under the Divorce Reform Act 1969. The wife had stated that she wished to make an application under s. 6 of the said Act for other ancillary relief. The petition was not sent to the solicitors but to the wife who did nothing. Section 6 of the Act provides that the respondent to a petition must apply to the court for it to be considered. The court held that since the wife did not apply therefore it could not be considered. F G H

8.3 The plaintiff failed to cause to be issued from the Registry of the court notice in Form 63 pursuant to O. 34 r. 2(1) RHC.

It is submitted by the learned counsel of the 1st defendant that the plaintiff had failed to cause to be issued from the Registry a notice in Form 63 pursuant to O. 34 r. 2(1) RHC. I

A In the case of *Sia Sung Ho v. Usaha Cendera Cerah Sdn Bhd* [2007] 9 CLJ 27 the court upheld the decision of the deputy registrar allowing the defendant's application to strike out the plaintiff's claim pursuant to O. 25 r. 1(4), O. 34 r. 2(2), O. 27 r. 3 RHC.

B 8.4 The plaintiff's default was intentional, contumelious, inordinate and/or in excusable and the 1st defendant has suffered prejudice.

C There has been inordinate delay and the plaintiff has failed to give any explanation as to the delay. The counsel cited the case of *Vasudevan Vazhappulli Raman v. T Damodaran P V Raman & Anor* [1981] CLJ 84; [1981] CLJ (Rep) 101, *Lim Heng Hoo v. Tan Hock Hai & Ors* [1973] 1 LNS 79, *Toh Hock Thye & Ors v. Toh Chwee Biow* [1981] 1 LNS 143, *Leong Seng Kiat v. Law Peng Guan & Ors* [1992] 2 CLJ 825; [1992] 2 CLJ (Rep) 710 and *Dato' Leong Pow Kue & Ors v. Gan Kim Sing; Pentadbir Tanah Daerah Johor Bahru & Ors (Third Parties)* [1999] 5 CLJ 426.

D

E **[9] The Respondent/Plaintiff's Argument**

9.1 Order 25 RHC is inapplicable

F The counsel for the plaintiff referred to the Practice Direction 1/2001 dated 19 June 2001 issued by the Registrar of the High Court of Malaya whereby it stated as follows,

> ... hasil dari perbincangan dengan YA-YA Hakim dan Pesuruhjaya kehakiman Mahkamah tinggi di persidangan Tahunan Majlis Hakim-Hakim 2001 mengenai pemakaian
G Aturan 25 Kaedah-Kaedah Mahkamah Tinggi 1980, YAA Hakim Besar Malaya telah mengambil maklum tentang keputusan mesyuarat yang telah bersetuju untuk menggantung pemakaian Aturan 25 Kaedah-Kaedah Mahkamah Tinggi 1980.
>
H 3. Sehubungan itu YAA Hakim Besar Malaya mengarahkan supaya pemakaian A. 25 Kaedah-Kaedah Mahkamah Tinggi 1980 di gantung sehingga satu keputusan mengenai kajian terhadap aturan tersebut dibuat. Dengan penggantungan tersebut, ini bermakna Aturan 25
I tidak lagi digunakan sebaliknya Aturan 34 Kaedah-Kaedah Mahkamah Tinggi 1980 hendaklah digunakan keseluruhannya dalam pengurusan kes ...

Therefore in light of the above the plaintiff submits that O. 25 is not applicable and the practice direction must be complied with.

Furthermore para. 5 of the practice direction states as follows:

> Semua Pejabat Pendaftaran Mahkamah Tinggi Malaya dikehendaki tidak menerima pemfailan dokumen-dokumen di bawah Aturan 25 Kaedah-Kaedah Mahkamah Tinggi 1980 kecuali saman minta arahan yang berkaitan dengan tanah dibawah seksyen 257 Kanun Tanah Negara 1965 ...

The learned counsel for the plaintiff cited the case of *Dato' Seri Anwar Ibrahim v. Tun Dr Mahathir Mohamad* [2010] 1 CLJ 444 where it was held that:

> ... practice directions do not have the force of law, they are created for a specific purpose, namely to regulate a systematic and consistent procedure governing the filing of appeal records. For that reason they have to be adhered to ...

9.2 The power under O. 34 RHC cannot be invoked by the 1st defendant

The plaintiff submitted that the 1st defendant had not satisfied the mandatory ingredients pursuant to O. 34 RHC in making such application to have the matter struck out. They are:

a) The 1st defendant failed to apply to the court to issue Form 64 notice to the plaintiff requiring the plaintiff to show cause as to why the action should not be struck out;

b) Form 64 either on the court's motion or applied by the 1st defendant was never issued to the plaintiff.

c) The plaintiff was not given an opportunity to show cause.

The plaintiff submitted that the 1st defendant's application to have this matter struck off under O. 34 is misconceived and untenable. The case of *Idealmart Rukindo Sdn Bhd v. Capital OCA Berhad & Anor* [2009] 1 LNS 75 was cited. In that case His Lordship Dato Hishamudin Mohd Yunus said that:

> ... the correct relief is to pray for in an application pursuant to Order 34 r. 2(2) is not to directly apply for the striking out of the writ of action for want of prosecution, but to first apply to the judge to issue to the Plaintiff a Form 64 Notice requiring the Plaintiff to show cause as to why the action should not be struck out ...

9.3 The principles governing the exercise of the court's discretion

The learned counsel for the plaintiff further submits that the discretion of the court to grant a draconian order should not be exercised. He referred to the case *Foo Poh Sang & Ors v. Lim Teik Cheong* [2006] 4 CLJ 235 where His Lordship Dato Gopal Sri Ram JCA (as he then was) said:

> ... The principles governing the exercise of this power are now well settled and are set out in the judgment of Abdoolcader J in *Vasudevan v. T Damodaran* [1981] CLJ 84; [1981] CLJ (Rep) 101:
>
> > ... the power of the court to dismiss an action for want of prosecution should be exercised only where the plaintiff's default had been intentional and contumelious or where there had been inordinate delay and inexcusable delay on his or his lawyer's part giving rise to a substantial risk that a fair trial would not be possible or to a serious prejudice to the defendant ... .

The plaintiff submitted that it was never the intention of the plaintiff to delay the matter and the plaintiff had every intention to dispose the matter expeditiously by filing the application for summary judgment. It is further submitted by the plaintiff that 1st defendant did not and could not have suffered any prejudice. The averment of the 1st defendant was neither supported by evidence nor was elaborated.

[10] I have considered the submissions of the parties and the authorities cited and therefore dismiss the application in encl. 12 for the following reasons:

10.1 The Practice Direction 1/2001 dated 19 June 2001 issued by the Registrar of the High Court of Malaya

The Rules of the High Court 1980 is made with the consent of the Chief Justices of Malaya and Borneo pursuant to the powers conferred under s. 17 of the Courts of Judicature Act 1964 (CJA). Rules of the court may be made for the

purposes set out under s. 16 CJA one of which is to regulate and prescribe the procedures and the practice to be followed in the High Court. A

Under O. 92 r. 3B RHC the Chief Judge of Malaya after consulting the Chief Justice may issue such practice directions as may be necessary for the better carrying out or giving effect to the provisions of the Rules of the High Court. B

The Practice Direction 1/2001 dated 19 June 2001 issued by the Registrar of the High Court of Malaya was issued for the purpose of regulating the procedure and to make the pre-trial case management procedures more effective, C

> ... Dengan penggantungan tersebut, ini bermakna Aturan 25 tidak lagi digunakan sebaliknya Aturan 34 Kaedah-Kaedah Mahkamah Tinggi 1980 hendaklah digunakan keseluruhannya dalam pengurusan kes ... D

The counsel for the 1st defendant citing the case of *Megat Najmuddin Dato Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd* [2002] 1 CLJ 645 submitted that O. 25 RHC is a rule of the court that has been statutorily laid down by the Parliament and as such the Practice Direction 1/2001 should have no legal effect. E

In the *Megat Najmuddin*'s case the respondent had filed an action in the High Court against the Appellant who stood as guarantor of an overdraft facility for RM500,000 granted to one Wira Kris Agricultural Services Sdn. Bhd. The appellant then filed his defence as well as a summons in chambers for an order under O. 18 r. 19(1)(b), (c) RHC to strike out the respondent's writ and statement of claim. The summons in chambers was part heard by the High Court but on the date of the continued hearing, the respondent counsel was absent. The court proceeded with the continued hearing and thereafter allowed the application. The respondent than filed an application to set aside the striking out order and to amend the summons in chambers. The court allowed both applications. The appellant then appealed to the Court of Appeal. However before the Court of Appeal the counsel for the respondent raised a preliminary objection that the F G H I

A appellant had not complied with the r. 18(4)(d) and (7) of the Rules of the Court of Appeal 1994 (RCA) as the sealed order in the Appeal Record was not a certified true copy and that the supplementary appeal record was filed without leave. The Court of Appeal allowed the preliminary objection B holding that the Record of Appeal was defective.

The appellant appealed to the Federal Court and the Federal Court by majority allowed the appeal. His Lordship Steve Shim CJ (Sabah & Sarawak) said that practice directions:

C

> ... provide guidelines for a more effective implementation of the rules of the court. They seek to clarify or highlight such rules. They may even, to some extent modify them, but certainly they are not meant to supersede or deviate from court rules which have been statutorily laid down.

D

His Lordship Justice Abdul Malek Ahmad FCJ (as he then was) said that:

> A practice direction has the force of law and the appellant had a duty to comply with it ...

E

In the instant case the Practice Direction 1/2001 dated 19 June 2001 issued by the Registrar of the High Court of Malaya did not deviate or supersede the court rules. The purpose of that Practice Direction was to effectively F implement the Pre-trial case management procedure under O. 34 RHC and to expedite the fixing and the hearing of cases in the High Courts.

Therefore unless that Practice Direction is revoked or withdrawn by the Registrar of the High Court of Malaya it G still remains effective. This means O. 25 RHC is still suspended and therefore cannot be applied by the 1st Defendant to strike out this action.

10.2 Order 34 RHC

H

The 1st defendant had not satisfied the ingredients pursuant to O. 34 RHC in making such application to have the matter struck out. The 1st defendant failed to apply to the court to issue Form 64 Notice to the plaintiff requiring the plaintiff to I show cause as to why the action should not be struck out;

The case of *Idealmart Rukindo Sdn Bhd v. Capital OCA Berhad & Anor* [2009] 1 LNS 75 that was cited by the plaintiff's counsel fits like a glove as his Lordship Dato Hishamudin Mohd Yunus said that:

> ... the correct relief is to pray for in an application pursuant to Order 34 r. 2(2) is not to directly apply for the striking out of the writ of action for want of prosecution, but to first apply to the judge to issue to the Plaintiff a Form 64 Notice requiring the Plaintiff to show cause as to why the action should not be struck out ...

Since the 1st defendant has not complied with the requirements under O. 34 RHC therefore the application to have the matter struck off under this order will fail.

10.3 Intentional and contumelious or where there had been inordinate delay and inexcusable delay by the plaintiff giving rise to a substantial risk that a fair trial would not be possible or to a serious prejudice to the 1st defendant

There is no evidence to show that there was intentional and contumelious delay. The writ and statement of claim was filed on 12 August 2008. It was served on the defendant and the defendant filed their appearance on 15 October 2008. The statement of defence was filed on 26 December 2008 and the application for summary judgment was filed on 18 August 2009. The period between the filing of the defence and the application for summary judgment is seven months. However I am of the view that it was not an inordinate delay giving rise to a substantial risk that a fair hearing of the application would not be possible or to a serious prejudice to the 1st defendant.

[11] Based on the above reasons encl. 12 is dismissed with cost.